United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mailing

76-1075

B P/S

To be argued by
CHERYL M. SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1075

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH MARIANI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Ralph Mariani appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Platt, *J.*), entered on December 12, 1975, following a jury trial convicting him of aiding and abetting bank robbery by force, violence or intimidation (Count One) and of aiding and abetting armed bank robbery (Count Two), in violation of Title 18, United States Code, Sections 2113(a) and (d) and 2.[1]

Appellant was sentenced to consecutive terms of eight years incarceration on Counts One and Two, with execution of the sentence on Count Two suspended and the defendant placed on probation for a period of five

[1] Felix Aceved[illegible]he principal in the robbery and appellant's co-defendant, pleade[illegible] to violation of Section 2113(a) after the case was sent to the [illegible]y.

years on that count. Appellant is currently serving his sentence.

Appellant presents these claims on appeal: (1) that it was an abuse of discretion to deny his motion for a severance, (2) that his prior narcotics conviction should not have been admitted into evidence on the ground that it's prejudicial effect outweighed its probative value, (3) that it was improper to allow the Government to impeach his credibility as a witness with bullets found in his car, and (4) that the evidence was insufficient for a finding of guilt beyond a reasonable doubt.

Statement of Facts

A. The Robbery and Arrest

Pursuant to information received from a registered New York City police informant that a stolen red and white gypsy cab was going to be used to rob the Chemical Bank at the corner of Cortelyou Road and East 16th Street in Brooklyn on August 25, detectives attached to the Major Case Squad were assigned to keep that cab under surveillance (T. 85, 110-112, 184-6).[2] The cab was parked in front of 649 Argyle Road, Brooklyn (T. 87), about 10 blocks from the bank (T. 130). At approximately 2:20 P.M., two Hispanic males entered the cab (T. 122). One of the men, appellant Mariani, entered the driver's seat, and the other, co-defendant Acevedo, sat in the right rear seat (T. 85). Acevedo had a large "Afro" hairstyle (T. 92). The cab, which was at all times under the observation of the detectives, proceeded towards the bank, twice hesitating momentarily at the curb along the way (T. 228).

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[2] Numbers in parentheses preceded by "T." refer to page numbers of the transcript.

When the cab approached the bank it slowed down and passed by it (T. 88, 167). About five minutes later, the cab returned and this time double-parked alongside the bank (T. 88, 167). The driver, Mariani, kept the engine running (T. 90). Acevedo, who was occupying the passenger seat, exited the cab, walked up to the bank window, looked back at the cab, proceeded toward the bank, looked back again at the cab, and then entered the bank (T. 89, 167). He was carrying a brown manila envelope (T. 167).

Acevedo went to the customer service counter and entered a teller's line (T. 168). When it was his turn, he approached one of the tellers (T. 168), pointed a gun at her and handed her the manila envelope, demanding "Give me all your money, large bills, large bills" (T. 137-38). The teller filled the envelopee with cash amounting to $2,398 (T. 146).

When Acevedo left the bank, he was carrying the envelope in his left hand and the short-barrelled revolver in his right hand (T. 102, 168). Acevedo proceeded in the direction of the cab, but was apprehended a short distance from the bank (T. 168). The envelope and gun, as well as his sunglasses and wig were confiscated (T. 254, 171-72). The gun was loaded and was found to be operative (T. 257, 319).

When Acevedo left the cab for the bank, appellant remained in the driver's seat, with the engine of the cab running (T. 90). At about the time Acevedo was apprehended, Mariani drove off at a high rate of speed (T. 91, 169, 229). He pursued a course which took him down two one-way streets in the wrong direction, and collided with another car along the way (T. 229-31). Finally, he abandoned the cab and fled the scene on foot (T. 230-31). The police officers were unable to apprehend Mariani at the time (T. 231).

Acevedo was taken into custody by special agents of the Federal Bureau of Investigation. He signed a statement in which he admitted going into the bank with a .32 caliber black revolver and demanding money from a teller (T. 241). He also made an oral statement to the special agents about Mariani's role in the robbery, but this statement was not offered in evidence in order to avoid any *Bruton* problems (T. 57-9).

From five until eight o'clock that evening, a special agent of the Federal Bureau of Investigation and a police detective waited in Mariani's apartment to arrest him (T. 265). At the request of Mrs. Mariani, they left at eight o'clock (T. 278) and waited outside the building until approximately 11:45 P.M. (T. 265). At that time they re-entered Mariani's apartment and placed him under arrest (T. 262).

Mariani gave the FBI agents written permission to search his car, which was parked at 668 Argyle Road (T. 298, 300). He was taken to FBI headquarters (T. 268) and questioned about the robbery. At first he denied being present at the bank (T. 216, 297), but later he provided a signed statement, which reads in pertinent part:

> On August 25, 1975, Felix Acevedo and I met on the street. He invited me to go for a ride in a car and he asked me to drive the car. I drove the car which was a red and white Dodge. Acevedo directed me to drive by 1600 Cortelyou Road, Brooklyn, New York, and then he directed me to stop next to the Chemical Bank.
>
> He [Acevedo] asked me to wait for him and he indicated he was going to go and get some money.

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[3] *Bruton* v. *United Statets*, 391 U.S. 123 (1968).

> I saw him go into the bank and assumed that he was going in to rob the bank. I knew he was armed and I did not want to get involved. I panicked and I left as fast as I could. I do not know for certain if I was being followed.
>
> I found myself going the wrong way on a one-way street, hitting another automobile and having lost the brakes in the car I was driving.
>
> I finally abandoned the car on Rugby Road . . .

This statement was made after Mariani had been given his constitutional rights by FBI agents. Subsequently, Mariani alleged the statement was not voluntarily made. The Court held a suppression hearing, and found appellant's claim of coercion to be unfounded (T. 55-56).

B. Motion for a Severance

Appellant requested in a pretrial motion that his trial be severed from that of his co-defendant Acevedo claiming that since his co-defendant had made a statement implicating him in the robbery, the *Bruton* rule required a separate trial to avoid prejudice to his defense. The Court denied the motion because a satisfactory redaction of Acevedo's statement was made.

During the trial, appellant again asked for a severance on the ground that he was denied a fair trial because his co-defendant put forth a defense inconsistent with his own, that is, Acevedo admitted robbing the bank while appellant claimed no prior knowledge of Acevedo's plans (T. 214). The court found that the defenses were not inconsistent and denied the motion.

Mariani again asked for a severance of the trials at the conclusion of the case. While the jury was deliberat-

ing Acevedo entered a plea of guilty to Count One of the indictment, charging him with robbery by force, violence or intimidation in violation of 18 U.S.C. § 2113(a) (T. 583). Mariani asserted that Acevedo might be in a position to exonerate him; the basis of this assertion was a letter written before the trial by the Assistant United States Attorney which stated that the co-defendant had made inconsistent statements concerning Mariani's participation in the robbery (T. 585-6). The Court denied appellant's motion for a severance (T. 584).

C. The Defendant's Testimony

Mariani testified on his own behalf. He stated on direct examination, in reference to his background, that he had been an addict in 1969 and had pleaded guilty to possession of drugs (T. 329) but had become drug-free through a three-year program undertaken as part of his probation (T. 330). He also stated that he had pleaded guilty in connection with a robbery charge in April, 1975 but claimed to be innocent of that crime (T. 331-32), explaining that he had accompanied a friend who was the guilty party (T. 331).

Mariani testified that as of the day of the robbery he had been unemployed for five months (T. 361) and had an appointment with the unemployment office (T. 333). He claimed that he intended to drive to his appointment in his car which was parked some distance from his apartment (T. 333). At about 12:30 P.M., Acevedo came to Mariani's apartment and offered to take him to his car "after he copped some dope" (T. 334).

Mariani then accompanied Acevedo in the gypsy cab to the corner of Howard and Sutter Street, where Acevedo presumably "shot some drugs" (T. 335-36). When Acevedo returned to the car, he was staggering and nodding; Mariani decided to drive the cab back to the place

where his car was parked (T. 337-38). As they approached the intersection of Cortelyou Road and East 16th Street, Acevedo directed Mariani to pull up next to the Chemical Bank (T. 339). Mariani testified that Acevedo was sitting in the front seat, not the rear as the Government witnesses stated, and that when they reached the bank Acevedo took a brown folder from under the seat and donned a wig and sunglasses (T. 341). Acevedo extracted a gun from under his belt and instructed Mariani to wait for him because he was going to get some money (T. 342). It was at that point that it occurred to Mariani that Acevedo was going to rob the bank (T. 342-43).

Mariani stated that he took off in the cab about thirty to thirty-five seconds after Acevedo entered the bank. He asserted that he did not want to get involved in a robbery because people in that neighborhood knew him (T. 343). When the brakes failed and he collided with another car (T. 344), Mariani abandoned the car and hid out at a friend's apartment nearby (T. 344-45).

Later that day Mariani learned from his wife that FBI agents wanted to question him concerning the robbery. He told her that he would turn himself in after he bathed, and he called FBI headquarters to leave a message to that effect (T. 342-8). However, he was arrested before he could leave for the FBI office (T. 348).

Mariani admitted inconsistencies in his statements. First he insisted that he knew nothing about the robbery (T. 349); subsequently he signed a statement in which he admitted he was the driver of the cab and "assumed" that Acevedo was going to rob the bank when he entered it (T. 359).

On cross-examination, Mariani revealed that he and Acevedo had been friends for twelve to fifteen years

(T. 60). He had never seen the co-defendant with the red and white cab at any time before the day of the robbery (Tr. 368). He stated that Argyle Road (where both the cab and his own car were parked on August 25) is only a few blocks from his apartment (T. 366), but denied being on Argyle Road that day (T. 384).

Mariani testified that the government witnesses had lied when they said that Acevedo was in the back seat of the cab (T. 377) and when they said he initially denied knowledge of the robbery (T. 393). He also denied that he told FBI agents on the night of his arrest that he wanted to be in a drug program (T. 367). Although he quibbled with the use of three words in his signed statement and claimed that the agents had altered his expression, he testified that the statement was truthful (T. 392-94).

When questioned further about his sttatements to the FBI agents, Mariani denied giving them written permission to search his car (T. 399-400). After he was shown the document which granted such permission (Government's Exhibit 14), he stated that the exhibit refreshed his recollection (T. 401). When asked if he had told the agents that they would find bullets in his car when they searched it, he denied making such a statement (T. 4001-02). When shown the bullets found in his car, he insisted that they did not refresh his recollection as to his statement to the agents, and he volunteered that he would not ever have admitted owning a car if he thought there were bullets in it (T. 404-05).

ARGUMENT

POINT I

The court properly denied appellant's motion for severance.

Appellant Mariani and his co-defendant Felix Acevedo were jointly indicted for bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d) and §2. According to the Government's theory of the case, Acevedo was the principal and Mariani aided and abetted him in the robbery by acting as the driver of the getaway car.

Appellant made three separate motions for a severance of his trial. The first, a pre-trial motion, was based on a claim of possible prejudice resulting from his co-defendant's statement implicating him in the robbery. He argued that *Bruton* required a severance. A redaction of the statement eliminated this objection. After opening statements, Mariani again moved for a severance on the ground of inconsistent defenses. His co-defendant admitted robbing the bank but denied that he used a gun, while Mariani admitted that he drove the intended getaway cab but denied that he had prior knowledge of the plan or intent to rob the bank. In essence, Mariani shifted the blame to Acevedo, but Acevedo took no position with respect to Mariani's participation. The Court found that the defenses were not inconsistent and denied the motion. Finally, at the close of the case, while the jury was deliberating but after Acevedo had pled guilty, Mariani asked for a severance, again claiming undue prejudice. The Court denied this motion as well:

> Mr. Flamhaft: . . . the application would be to move for a severance at this time. Initially I had moved for a severance and now I think my

> position is bolstered by the fact that my client could not have received—did not or cannot receive a fair trial with — by being tried together with Mr. Acevedo. . . .
>
> The Court: Until that time [the sentencing of Acevedo], until the judgment is entered there will be no change in the posture of this case. I am not going to sever this—the two cases at this point. I don't think there is anymore reason now than there was at the beginning. It is a jury question as to whether or not your client was an aider and abetter. (T. 583-5).

Although appellant complains of the court's denial of "defendant's motions for severance, made both before and during trial" (Appellant's Brief at 19), he relies on appeal on the issue of Acevedo's potential testimony to establish substantial prejudice in the joint trial. Of course, the matter of Acevedo's testimony concerning Mariani's knowledge of the plan to rob the bank did not arise until the case had gone to the jury, and the court would have had to declare a mistrial or grant a new trial rather than a severance at this point.

Appellant concedes that in order to obtain a severance so that the co-defendant could testify, a defendant must make a clear showing of the substance of the testimony and that it would be exculpatory (Appellant's Brief at 24). He claims, however, that because of judicial interference it was impossible to show that the co-defendant would exculpate him. He argues that the Court intimidated Acevedo by implying that he would not accept his guilty plea if he exonerated Mariani and refused to allow appellant's questioning of Acevedo during his plea.

The record discloses that far from preventing an inquiry into Acevedo's knowledge of Mariani's role, the Court was attempting to prevent collusion between the defendants. At this stage of the case, Acevedo had heard

both the overwhelming evidence against him and also Mariani's testimony about his lack of knowledge. It was not unreasonable for the Court to suspect that Acevedo, after pleading guilty, might try to accept the entire blame for the robbery so that his friend of 12 to 15 years could go free. His cautionary statement to Acevedo was not made to intimidate Acevedo but rather to protect the integrity of the proceedings.

> The Court: If there is anything which appears to me to be some sort of collusion to affect this jury's verdict, I am going to reject [the guilty plea] (T. 581).

The Court had every reason to be wary of collusion in light of Acevedo's initial implication of Mariani, followed by a retraction of that statement after both had been in custody pending indictment.

Even assuming that Mariani had a right to cross-examine Acevedo during his guilty plea, the court did not prohibit all inquiry. He merely excused Acevedo from the witness stand so that he might consult with his attorney.

> The Court: . . . I am going to excuse him from the witness stand. If Mr. Passalacqua wants to —— to let you talk to him, that's one thing.
>
> Mr. Passalacqua is his lawyer.
>
> * * * * *
>
> Mr. Passalacqua: First, I'll speak to my client privately (T. 578-80).

After discussing the matter with his attorney, Acevedo declined to talk with Mariani's attorney.

The Court's actions were proper and do not even approach the kind of judicial interference criticized by this Court in *United States* v. *Nazzarro*, 472 F.2d 302 (2d (Cir. 1973).

Appellant further argues that there was evidence that Acevedo at first incriminated Mariani in his statement to the FBI but later exonerated him. What the record reveals is that Acevedo offered inconsistent versions both of his and of Mariani's participation in the robbery (T. 585-86, 426-35, 558-79). Indeed, the Court would have been justified in concluding that Acevedo's testimony, whether on behalf of Mariani or the Government, would be subject to substantial, damaging impeachment. The Court's denial of the motion to sever thus comports with the standards of this Circuit, as most recently set forth in *United States* v. *Finkelstein*, 526 F.2d 517, 523-25 (2d Cir. 1975).

Appellant also asserts that the joinder was prejudicial because the evidence against Acevedo was overwhelming. However, one is not entitled to a severance merely because he is more likely to be acquitted in a separate trial. *United States* v. *Larson*, 526 F.2d 256, 260 (5th Cir. 1976).

Appellant concludes his argument by stating that a new trial is necessary "so that evidence from Acevedo could be obtained to the appellant's benefit." (Appellant's Brief at 24-5). Yet even now, months after Acevedo has been sentenced, and any alleged coercion by the Court could no longer influence Acevedo, the appellant has made no showing that Acevedo would in fact exonerate him.

Based on the record, it is clear that the Court acted properly in denying appellant's motion to sever.

POINT II

The court did not abuse its discretion in finding appellant's prior narcotics conviction admissible.

Appellant sought a ruling in advance of trial that in the event he testified, the Government would be precluded from questioning him about a narcotics conviction (T. 23). The court refused to exclude the conviction, on the ground that it was "highly probative" and relevant to motive for bank robbery (T. 24). Mariani, without any indication of the Government's intent to use the conviction for impeachment, testified about the conviction on direct examination.

A defendant may be impeached through evidence of a prior conviction if the court determines that its probative value outweighs its prejudicial effect. Federal Rule of Evidence 609(a); *United States* v. *Palumbo*, 401 F.2d 270, 273 (2d Cir.), *cert. denied*, 394 U.S. 947 (1969); *United States* v. *Puco*, 453 F.2d 539, 541 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1973); *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974). Similarly, evidence of other crimes is admissible for the purpose of showing motive. Federal Rule of Evidence 404(b); *United States* v. *Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). The court has wide discretion in determining the admissibility of prior convictions for the purpose of impeachment and the court's ruling will not be disturbed on appeal unless it constituted an abuse of discretion. *United States* v. *Palumbo*, *supra*, 401 F.2d at 273-74; *United States* v. *Puco*, *supra*, 453 F.2d at 541-42.

In the instant case, the Court found that the probative value of the conviction as it related to motive outweighed any prejudice to the defendant. Appellant claims on appeal that he is not presently a narcotics addict and therefore the conviction is not relevant to motive. (Appellant's Brief at 29). However, this assertion was not presented to the Court when appellant requested the ruling. Moreover, appellant pled guilty in April, 1975 to another narcotics possession charge, of which he now claims to be innocent, and there is some basis for believing that he asked the arresting FBI agents to get him into a drug treatment program (T. 367).

This Court has recognized the interest in having a jury judge the credibility of a defendant by knowing of his previous crimes, *United States* v. *Palumbo*, *supra* 401 F.2d at 273. This is especially important when there is a direct conflict in testimony between the defendant and the agents, as in the instant case. Moreover, it has recognized that in some circumstances a narcotics conviction can properly be used to impeach a defendant. *United States* v. *Puco*, 453 F.2d *supra* at 543, n. 11 citing *United States* v. *McIntosh*, 426 F.2d 1231, 1233 (D.C. Cir. 1970). In *McIntosh*, the court permitted the use of a recent narcotics conviction for impeachment; Judge Bazelon in his dissent indicated he might have reached a different result if there were evidence that the defendants were addicts or were convicted of possession for use rather than for sale, 426 F.2d at 1236. Mariani, it will be recalled, was a user of narcotics.

Finally, appellant's argument that the prior conviction could have "tipp[ed] the scales toward a verdict of guilty and for that reason becomes a prejudicial error" (Appellant's Brief at 29-30) is rather disingenuous. At the sentencing, appellant's counsel indicated that if Mariani's addiction had affected the jury's deliberations at all, it was in his favor.

> Mr. Flamhaft: . . . I took the liberty, Your Honor, after the trial to speak to some of the jurors and to gain their impression of Mr. Mariani and his role in this case. One thing that stood out in my mind was the fact that they were impressed by the fact that Mr. Mariani had on his own, and I think it is borne out in the probation report, voluntarily committed himself to the drug rehabilitation program. (Sentencing minutes, p. 4).

Thus, even if it were error to allow evidence of the prior conviction, it was harmless error. *Chapman* v. *California*, 386 U.S. 18, 22-4 (1967).

POINT III

Appellant was properly cross-examined concerning the bullets found in his car.

The use of the bullets (found in Mariani's car) to impeach his credibility presents an issue in somewhat unique context. Although the Government contends that the bullets were discovered pursuant to the voluntary, written consent of the appellant, the Government did not attempt to use this evidence in its direct case. Consequently, no pre-trial suppression hearing was held, and the issue of the legality of the seizure was not determined below.*

Mariani testified in his own case, and directly contradicted Government witnesses in several important respects

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* There was a pre-trial hearing on the voluntariness of the appellant's confession (T. 28-56), during which the circumstances of his arrest, when he gave the consent, as well as his interrogation at FBI headquarters were examined. The confession was held to be admissible.

concerning his activities prior to the bank robbery.[5] In an attempt to impeach his credibility, the Government questioned the defendant about various statements he had made to the arresting agents, *e.g.*, his request for drug rehabilitation (T. 367), his initial denial of any knowledge about the bank robbery (T. 393), and his written consent to search his car (T.400).

More specifically, the Government had established on its direct case that Mariani and his co-defendant were seen getting into the cab on Argyle Road at about 2:20 P.M. on the afternoon of the robbery (T. 85-7) and that Mariani's own car was found later that day parked on the same block (T. 298). On direct examination, Mariani stated that he was trying to reach his own car when his co-defendant instructed him to pull the cab up next to the bank (T. 338-9); therefore, he presumably never reached his car. It was important to the Government's case to refute Mariani's denial that he entered the get-away cab a few blocks from the bank and drove directly to the bank.

It was the Government's theory that Mariani and Acevedo used Mariani's car in preparation for and as part of the scheme of the robbery. Mariani's car was the vehicle they used to reach the cab which Mariani drove to the bank. Thus, the location of Mariani's car and its contents were important factors in reconstructing the preparation for the robbery. And, as a matter of fact, a search of Mariani's car did reveal a supply of bullets.

On cross-examination, therefore, the Government asked Mariani if he had been on Argyle Road at 2:00

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[5] He also implied that his statement, introduced in evidence, was inaccurate in details of expression but not in substance.

P.M. on the date of the robbery; the defendant replied that he had not (T. 384). Next, Mariani was asked whether he had had bullets in his car. He replied, "Never. Not to my knowledge." (T. 395). The Government was then permitted to ask the defendant if he told an arresting agent, to whom he had given written permission to search his car, what he would find in the car (T. 431). The defendant replied that he had told the agent he would find a gun but denied mentioning the bullets (T. 401-04). Thereupon, the Government was permitted to mark the bullets found in his car for identification and to show them to Mariani (T. 434).

The court ruled that the bullets could be used solely for the purpose of impeaching the defendant's credibility; accordingly, the court did not hold a hearing on the legality of the search and seizure (T. 403). We believe that if the court had held such a hearing, it could, based on the facts, have concluded that Mariani's written consent authorized the search of his car and the discovery of the bullets.

Even if the court had determined that the search was improper and the fruits of the search were tainted, the bullets would be available for impeachment under the principles expressed in *Walder* v. *United States*, 347 U.S. 62 (1954) and *Harris* v. *New York*, 401 U.S. 222 (1971). In both of these cases, defendant opened the door on direct examination for his impeachment. Similarly here, when Mariani testified "I wouldn't rob a bank." (T. 343) and that he first entered the cab in front of his apartment on East 19th Street, he exposed himself to the risk of impeachment by contrary statements. Therefore, confronting him with his statement to the agents that they would find bullets in the car—pursued a matter of relevance to establishing preparation and planning for the robbery. The fact that the bullets *were* found in

Mariani's car and that his car *was* parked on Argyle Road only a few feet from the spot where he had been observed entering the getaway cab at about 2:00 P.M., contradicted his self-serving statement that he would never rob a bank and that he entered the cab in front of his house rather than on Argyle Road.

The appellant thus went beyond a mere denial of his participation in the crime. He made the broad statement that he would not rob a bank, and he testified at length about his activities on the day in question, directly contradicting the Government's witnesses. As the Supreme Court stated in *Harris*:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. (401 U.S. at 225).

The reasoning of *Harris* was recently adopted by this Court in *United States* v. *Frank*, 520 F.2d 1287 (2d Cir. 1975), *cert. denied*, — U.S. —, 96 S. Ct. 878 (1976):

> As *Harris* holds . . . a person cannot affirmatively resort to perjurious testimony and avoid impeachment by evidence however obtained . . . We cannot feel overly sympathetic to the novel argument that a defendant was prevented from furnishing perjurious testimony by the existence of this evidence in Government hands (520 F.2d at 1291).

Appellant speculates about the significance of the bullets in the jury's deliberations. It is fruitless to guess at which factors exerted the most influence. While deliberating, the jury requested a copy of Mariani's statement for examination, and asked for an FBI agent's report as well as the testimony of the New York City

detectives who observed Mariani before, during and after the robbery. One may conclude that the jury compared Mariani's explanation of the events with the observations of the detectives and chose to credit the Government witnesses, and that it was Mariani's own statements and not the bullets that were the deciding factors in reaching a verdict.

In addition to mere speculation as a ground for reversal, opposing counsel would have this Court overturn the conviction for purported prejudice to his client in the Court's charge to the jury. The argument runs that the District Judge did not include instructions limiting the jury's consideration of the bullets solely for impeachment purposes and that as a result, the bullets were treated as evidence of guilt. In the light of the record, appellant's argument is unconvincing.

First, defense counsel raised no objection at the time of the Government's questioning of Mariani concerning the bullets in his car. This failure to object to the specific questions waived any claim of error.

Second, defendant did not request a limiting instruction at trial or after the charge to the jury. He cannot now assign as error the omission of such a charge unless it was plain error. *United States* v. *Glazer*, — F.2d — (2d Cir. Slip op. 2201, 2205, decided March 1, 1976); *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1966); *United States* v. *Sherman*, 171 F.2d 619, 624 (2d Cir.), *cert. denied*, 337 U.S. 931 (1948).

Third, the Court did charge the jury in supplemental instructions that the bullets found in Mariani's car could not be considered as evidence of his commission of the crime.

The Court addressed the jury as follows:

> . . . the bullets were not marked into evidence. They were used for the purpose of testing the credibility of Mr. Mariani on cross-examination and for that limited purpose only. I will not try to paraphrase what Mr. Mariani said with respect to the bullets, but they were not admitted into evidence so you may not have them. They are not exhibits. (T. 602-03).

The Court did not err in permitting the use of the bullets for impeachment purposes, and it properly instructed the jury on this matter. Even assuming that it was error to allow the use of the bullets, appellant has not demonstrated that he was substantially prejudiced thereby, and therefore it would be harmless error. *Chapman* v. *California*, *supra*, 386 U.S. at 22-24.

POINT IV

The evidence was sufficient to support a finding of guilt beyond a reasonable doubt.

The evidence presented at trial must be viewed upon appeal in the light most favorable to the Government. *United States* v. *Castellano*, 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966). All permissible inferences are to be construed in the Government's favor. *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965); *United States* v. *Dardi*, 330 F.2d 316, 325 ,(2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

Testimony of the Government witnesses showed that Mariani and Acevedo got into a stolen gypsy cab parked a few blocks from the bank. The police had received a tip that the cab would be used to rob a bank that day. Mariani, a friend of Acevedo for 12 to 15 years, took the driver's seat, and Acevedo sat in the right rear passenger

seat, wearing a disguise of an Afro wig and sunglasses. The cab proceeded to the bank, pausing briefly twice along the way. The cab passed by the bank then circled back and double parked beside the bank. Acevedo entered the bank in the disguise. After 2 to 5 minutes, Mariani took off at high speed and abandoned the car a few blocks from the bank. Later, after being arrested and taken to FBI headquarters for questioning, Mariani made a false exculpatory statement, denying any knowledge of a bank robbery. Then he signed a statement in which he admitted knowing that Acevedo had had a gun when he entered the bank and "assuming" that Acevedo was going to rob the bank. Mariani's own car, was found parked on the same block where he had been observed entering the getaway cab.

Appellant argues that the sole incriminating evidence consisted of the bullets found in Mariani's car and since the bullets were admitted only to impeach the appellant's credibility they cannot be considered as substantive evidence.

But, Mariani's behavior prior to and during the robbery was sufficient for the jury to conclude that Mariani was to be the getaway driver for Acevedo. *Cf. United States* v. *Jarboe*, 515 F.2d 33 (8th Cir. 1975), *cert. denied*, — U.S. —, 96 S. Ct. 90 (1976); *United States* v. *Chaney*, 446 F.2d 571 (3d Cir.), *cert. denied*, 404 U.S. 993 (1971). In addition, the jury was entitled to consider Mariani's first false exculpatory statement as consciousness of guilt. *United States* v. *DeAlesandro*, 361 F.2d 694, 697-98 (2d Cir. 1966), *cert. denied*, 385 U.S. 842 (1966).

There was more than sufficient substantive evidence to justify a finding of guilt beyond a reasonable doubt.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 26, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 30th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Stephen Flamhaft, Esq.
32 Court Street
Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
30th day of March, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires